IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 14431 of 2007

For Approval and Signature:

HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DALJITSINGH INDRAJITSINGH SASAN @ DILU @ MANGALSINGH - Applicant(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR VIRAT G POPAT for Applicant(s) : 1,
MR ME MENGDEY, ADDL. PUBLIC PROSECUTOR for Respondent(s) : 1,
MR PR ABICHANDANI for Respondent(s) : 2,

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CORAM : HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 17/12/2007

ORAL JUDGMENT

1. Rule. Mr.M.R.Mengdey, learned Additional Public

Prosecutor waives service of notice of Rule on behalf of the respondent No.1 – State of Gujarat and Mr.Pitambar R. Abichandani, learned advocate waives service of notice of Rule on behalf of the respondent No.2.

2. By this application under Section 482 of the Code of Criminal Procedure, 1973 (the Code), the applicant has challenged the order dated 19th November, 2007 passed by the learned Presiding Officer and Additional Sessions Judge, Fast Track Court No.5, Ahmedabad (Rural) (the learned Judge), below Exh.236 in N.D.P.S. Case No.4 of 2002 and has sought a direction against the concerned Court to summon / produce the ATS Police Station Entry Register of September, 2001 in N.D.P.S. Case No.4/2002.

3. The facts of the case stated briefly are that the applicant is the original accused in N.D.P.S. Case No.4/2002 and is facing the charges under the N.D.P.S. Act with other accused. It is the case of the applicant in the application that the prosecution witnesses have been examined by the learned Judge, and after the evidence of the prosecution was over, the closing pursis came to be filed. Thereafter, further statements of the accused came to be recorded. On 16th October, 2007, the applicant filed an application Exh.233 for examining an ATS Officer, who maintains the entry register in the ATS Office so as to enable the applicant to establish that no such raid / trap was carried out on the alleged day of incident, but that, it was preplanned by the LCB Officers and ATS Officers to falsely rope in the present applicant in the incident. It is further the case of the applicant that the learned Judge

had rejected the request of the applicant to examine the said witnesses and moreover, the Court had also not called for the Entry Register from the ATS Office, which was a material piece of evidence insofar as the present case is concerned.

4. The applicant, therefore, made another application dated 19th November, 2007 below Exh.236 under the provisions of Section 91 of the Code, requesting the Court to call for the ATS Register. By the impugned order dated 19th November, 2007, the said application came to be rejected, which has given rise to the present application.

5. Heard Mr.Virat G.Popat, learned advocate for the applicant, Mr.M.R.Mengdey, learned Additional Public Prosecutor for the respondent No.1 – State of Gujarat and Mr.Pitambar R. Abichandani, learned advocate for Narcotic Control Bureau, respondent No.2.

6. Mr.Popat, learned advocate has contended that the Entry Register of ATS was an important piece of evidence, from which it could be established that the ATS Officers were never present at the time when the raid was carried out. That no prejudice could have been caused to the prosecution if the ATS Entry Register was called for under Section 91 of the Code of Criminal Procedure.

7. It was submitted that, non-production of the Entry Register of the ATS of September, 2001 would not only harm the fair defence of the present applicant, but would also be violative of the fundamental rights of the

applicant to develop his defence as recognized by various decisions of the Apex Court. It was further submitted that one of the grounds for rejecting the application was that the same had been made with a view to delay the trial. It was urged that the applicant does not gain anything by delaying the trial as he is an under-trial prisoner. It was, accordingly, urged that the application be allowed by quashing and setting aside the impugned judgement and order, and directing the learned Judge to summon / produce the ATS Police Station Entry Register of September, 2001 in N.D.P.S. Case No.4/2002.

8. In support of his contentions, learned advocate for the petitioner has placed reliance upon a decision of this Court in the case of ***Maheshchandra K. Trivedi v. State of Gujarat***, [(2000)1 GLR 701].

9. On the other hand, Mr.Pitambar R.Abichandani, learned advocate for the respondent No.2 vehemently opposed the application. Learned advocate has submitted that dilatory tactics are being adopted by the applicant to prolong and delay the trial for reasons best known to him. It was submitted that the application in question is made on the basis of facts which were revealed through the cross examination of the witnesses way back in the year 2003. Therefore, the defence of the applicant was clear at the relevant time, however, he did not make any such application either at the relevant time or at the time when he submitted his list of defence witnesses.

10. It was further submitted that the applicant had earlier

moved an application below Exh.233 for examination of the officer, who maintains the ATS Police Station Entry Register and is conversant with the same, and praying that the needful be done to ensure his presence along with ATS Police Station September 2001 Original Entry Register. It was submitted that the said application was rejected by a reasoned order dated 1st November, 2007. However, the said order had not been carried any further by the applicant and the same has attained finality. It was submitted that this application was a subsequent application, more or less on the same ground, only the nomenclature is changed, and instead of praying for examination of a witness, the same is filed under Section 91 calling for production of the ATS Register of September 2001. It was submitted that, in effect and substance, the same prayer has been worded differently. In the circumstances, the learned Judge had no option but to reject the application. It was submitted that, therefore, the application was not maintainable. It was submitted that there was a bar against entertaining the application as it would amount to review of the order made on the earlier application.

11. It was further submitted that the proceedings before the Trial Court have almost concluded. The Court is at the fag end of the hearing of the matter. It was submitted that, the matter is posted for arguments and the prosecution has already submitted its written submissions, it is at this stage that this application has been moved, which amounts to abuse of process of Court.

12.Mr.M.R.Mengdey, learned Additional Public Prosecutor for the respondent No.1 – State of Gujarat has adopted the submissions advanced by Mr.Pitambar R.Abichandani, learned advocate for the respondent No.2.

13.In rejoinder, Mr.Popat, learned advocate for the applicant has submitted that the application Exh.233 and the application Exh.236 are different applications. The first application is for examination of a witness, whereas the second application is for production of documents under Section 91 of the Code. It was submitted that, calling for a defence witness and seeking production of document which is governed by the provisions of Section 91 of the Code are different issues. It was submitted that the accused can always ask for production of documents specially when prosecution is not able to show prejudice and the accused has been able to establish that it is relevant for his defence. It was submitted that it was always open to the applicant at any stage of the trial to ask for production of a document. That there was no delay in giving the application after the defence evidence had commenced. It was further submitted that the applicant had not asked for the document at the relevant time when the contradiction was brought on record as it could destroy his defence and has strategically asked for production of the same at this stage of the trial. It was submitted that the document in question was an important piece of evidence, and that the learned Judge was not justified in holding that the same was not relevant. In support of his submission, learned advocate placed reliance upon a decision of this Court in the case

of ***Pravinkumar Lalchand Shah v. State***, [1982(1) GLR 116].

14. This Court has considered the submissions advanced by the learned advocate for the parties and has perused the available record.

15. The facts of the case clearly show that the applicant had made an application below Exh.233 stating that he desires to examine a witness in his defence. He has, accordingly, prayed that the needful be done for the purpose of ensuring the presence of an officer who maintains the ATS Police Station Officers' Entry Register and is conversant with the same, to remain present with the ATS Police Station September 2001 Original Entry Register.

16. This application was rejected by an order dated 1st November, 2007 which admittedly has not been challenged by the present applicant. Subsequently, within a period of 19 days from the passing of the said order, the applicant has moved the present application under Section 91 of the Code, praying that summons be issued to the In-charge Officer of ATS Police Station to bring the September 2001 ATS Police Station Entry Register, wherein the details as regards where the ATS Police Station Officers have gone, are entered and to remain personally present for producing the same. The said application has been rejected by the impugned order dated 19th November, 2007. The reasons which have weighed with the learned Judge for rejecting the said

application are that this is a second application after a similar application for additional witness has been rejected; that written submissions have already been made by the prosecution and the matter stands over for further arguments of the parties to the trial; that the trial is over and the present application has been given by the applicant in the midst of the arguments; that a long time has elapsed for examination of defence witnesses for about six months after the evidence of the prosecution is over; that the applicant had ample time to move the present application and that sufficient leniency had been shown to the accused and that no further leniency can be granted. The Court was further of the view that the applicant had failed to satisfy the Court about the relevancy of the document, and that it appeared that the defence was trying to delay the trial with an intention to defeat the trial on one or the other ground.

17. A perusal of the application Exh.233 for examination of witnesses and the application Exh.236 for production of documents under Section 91 of the Code shows that the learned advocate for the respondent No.2 is justified in contending that both the applications are similar in nature, and that, mere change of nomenclature, does not mean that the nature of the applications are different. It is apparent that the prayers, though differently worded, in effect and substance, are the same. In the first application, the prayer is to summon concerned officer as a witness along with the ATS Police Station Entry Register of September 2001, whereas the second application is for production of the said Register by calling upon the

concerned officer to remain present along with the Register. Thus, the purpose of the first application was more or less the same, whereby the applicant had sought for production of the Register in question and had also sought to examine the concerned officer who maintains the said Register as a witness. The subsequent application is for production of the very same Register under Section 91 of the Code and asking the concerned officer to remain present and produce the same. Thus, in effect and substance, by both the applications, the applicant had sought for production of the ATS Police Station Entry Register of September 2001. Hence, it is amply clear that, in effect and substance, the present application is a second application seeking more or less the same relief. Considering the fact that the first application had been rejected by the learned Judge and has not been challenged by the applicant, the second application seeking more or less the same prayer, was not maintainable and has, accordingly, rightly been rejected by the learned Judge.

18. As regards the contention that it is open for the accused to move an application under Section 91 of the Code at any stage of the trial, in respect of which reliance is placed upon the decision of this Court in the case of ***Maheshchandra K. Trivedi v. State of Gujarat***, (supra), a bare reading of the said judgement shows that the Court has held that the privilege given under Section 91 of the Code of Criminal Procedure, if it is not used at proper time or stage, then, the defence of the accused might be prejudiced. So at any stage, whether at the

stage of framing of charge or at any other stage **before** the accused is compelled to enter into defence, he can legitimately pray that the prosecution be asked to produce certain documents. Thus, what has been held in the said decision is that, at any stage, whether at the stage of framing of the charge or at any other stage before the accused is compelled to enter into defence, he can pray for production of certain documents. The Court has not held that, at any stage, even after the accused has entered into his defence and after completion of recording evidence even at the stage of arguments, he can ask for production of certain documents by the prosecution. As is apparent from the facts noted above, in the present case, the trial is more or less concluded, recording of evidence is over, the matter is at the stage of arguments wherein written submissions have already been submitted. Hence, the request for production of documents at the stage of the trial does stage of trial does not appear to be either reasonable or bonafide.

19. Moreover, as is evident from the facts noted above, the contradiction upon which the applicant relies was brought on record way back in the year 2003. Thereafter, after the evidence of the prosecution was closed, the applicant had ample time to call for production of the Register in question. However, the applicant has not chosen to do so at the relevant time and at the stage of arguments, has moved this application under Section 91 of the Code contending that he has strategically asked for production of the same at this stage. Such a submission cannot be countenanced. The applicant cannot be permitted to

prolong and protract the trial in this manner, more so when the matter is at the stage of arguments.

20. Besides, it is settled legal position that, whether a particular document should be summoned or not, is essentially in the discretion of the Trial Court. Except for very good reasons, the High Court should not interfere with the discretion conferred on the Trial Courts in the matter of summoning documents. Such interferences would unnecessarily impede the progress of cases and result in waste of public money. (See Assistant Collector of Customs v. L.R.Melwani, AIR 1970 SC 962). Therefore, what has to be seen is as to whether the Trial Court has judiciously and judicially exercised its discretion. A perusal of the impugned order makes it amply clear that the Trial Court has duly considered all aspects of the matter before rejecting the petitioner's claim. There is nothing in the order passed by the Trial Court that would constitute any gross or improper failure to exercise its jurisdiction and consequently, it does not call for any interference by this Court.

21. For the foregoing reasons, this Court finds no infirmity in the discretion exercised by the Trial Court in not summoning the document in question. The application, therefore, fails and is, accordingly, rejected. Rule is discharged.

[HARSHA DEVANI, J.]

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